UNITED STATES
v.
GERALD HESS

IBLA 79-324 Decided February 13, 1980

Appeal from decision of Chief Administrative Law Judge L. K. Luoma dismissing a contest complaint against the Montezuma Nos. 8 and 10 and the N.J.J. Nos. 1, 4, 5, and 8 lode mining claims without prejudice.

Reversed.

1. Administrative Procedure: Adjudication -- Evidence: Burden of Proof -- Evidence: Prima Facie Case -- Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Rules of Practice: Evidence

   Where, in the hearing of a mining claim contest in which the presence of a mineral deposit within the limits of a claim is at issue and the claim is accessible, it is established that the Government mineral examiner made no professional examination of certain of the contested claims, the testimony of the Government mineral examiner, without more, is insufficient to establish a prima facie case of invalidity.

2. Evidence: Prima Facie Case -- Evidence: Sufficiency -- Mining Claims: Contests -- Mining Claims: Discovery: Geologic Inference

   The mere fact that mining claims are allegedly located in the same kind of area with the same topography as other claims where there has been no discovery does not, without more, support the conclusion that there is no discovery on the former claims. Geologic inference drawn from such alleged similarities is insufficient by itself to show that no discovery has been made on the claims.

3. Evidence: Prima Facie Case -- Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Mining Claims: Marketability

Uncontradicted evidence of nonproduction of a mining claim, which has continued over a period of years, is sufficient, without more, to establish a prima facie case of invalidity of the mining claim.

APPEARANCES: John McMunn, Esq., Office of the Field Solicitor, Department of the Interior, San Francisco, California, for the Bureau of Land Management and National Park Service; Gerald Hess, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On April 5, 1978, a contest complaint was filed by the Arizona State Office, Bureau of Land Management (BLM), on behalf of the National Park Service against the validity of the Montezuma Nos. 1-10 and the N.J.J. Nos. 1-11 lode mining claims, situated in Pima County, Arizona. The complaint named Gerald Hess as contestee and only party of interest to these claims and alleged that minerals had not been found within the limits of the claims, nor on any one of them, of sufficient quality and/or in sufficient quantity to constitute a discovery under the mining laws.

The contestee having timely answered this complaint, the matter was set for hearing and heard before Chief Administrative Law Judge L. K. Luoma on August 2, 1978, in Phoenix, Arizona. At this hearing, Government mineral examiner Robert O'Brien first testified that he had visited and inspected all of these claims except the N.J.J. Nos. 1, 4, and 8 claims on February 10 and 11, 1978 (Tr. 9, 16, 37). The mineral claimant testified, however, that O'Brien had also not visited the N.J.J. No. 5 claim and that he "just barely topped the corner" of the N.J.J. No. 8 and the Montezuma Nos. 8 and 10 claims (Tr. 50). In response to Hess' testimony, O'Brien later testified that he was not sure whether he had visited the N.J.J. No. 5 and the Montezuma Nos. 8 and 10 claims (Tr. 55).

Nevertheless, O'Brien testified as to all of the claims, even those he had admittedly not visited or was unsure about having visited, that a prudent man would not be justified in expending his time and effort with the prospect of developing profitable and paying mines there, as there is not enough paying ore on any of the claims to make doing so an economical venture (Tr. 27). He based his conclusion that there had been no discovery on the claims he had not sampled or otherwise examined on the fact that they are located in the same kind of area with the same topography as the other claims which he had visited (Tr. 34), and that Hess had not directed

him to any alleged discovery points on these claims (Tr. 35-37, 38). O'Brien testified that he had told Hess that he would try to come back to take samples from the remaining claims, but did not have the chance to do so (Tr. 34). He added that he had no excuse for going to hearing without having returned to take the samples (Tr. 34).

At the close of the Government's presentation at the hearing, contestee Hess stated his opinion that O'Brien's failure to examine all of the claims prevented an honest appraisal of their validity (Tr. 44). His testimony generally denied that the area where the claims are situated is nonmineral in character and challenged the validity of the Government mineral examination procedure (Tr. 40-51).

On March 27, 1979, Judge Luoma issued his decision, in which he held that the Government had met its burden of going forward with sufficient evidence to make a prima facie showing that a discovery of a valuable mineral deposit has not been made on the Montezuma Nos. 1-7, and 9, and the N.J.J. Nos. 2, 3, 6, 7, and 9-11 claims. He also held as to these claims that the evidence presented by Hess did not refute this prima facie showing and, accordingly, declared them invalid for lack of discovery.

As to the Montezuma Nos. 8 and 10, and N.J.J. Nos. 1, 4, 5, and 8 claims, however, Judge Luoma held that the Government had failed to meet its burden of going forward with sufficient evidence to make a prima facie showing that no discovery had been made on these claims, because O'Brien did not physically enter these claims nor take samples from them and therefore did not have an adequate basis for concluding that there had been no discovery there. He also held that Hess' objection to O'Brien's failure to visit all of the claims was tantamount to a motion to dismiss for failure to present a prima facie case of invalidity. Judge Luoma concluded that there was no evidence presented by either party on the question of the validity of these claims, as Hess had presented no evidence on this question, and accordingly dismissed the complaint without prejudice insofar as it concerned these claims.

The matter before the Board in this appeal is limited to whether Judge Luoma properly dismissed the contest against the Montezuma Nos. 8 and 10 and N.J.J. Nos. 1, 4, 5, and 8 claims, from which portion of his decision the Government filed a timely notice of appeal. While Hess also filed a timely cross appeal of the propriety of the portion of the decision which held the other claims invalid, he subsequently withdrew this appeal in favor of participation as appellee in the Government's appeal.

By locating a mining claim and alleging that he has discovered a valuable mineral deposit there, a mining claimant asserts that he has a superior right to the land over the Government under the

authority of R.S. 2319 and 2320, 30 U.S.C. §§ 22 and 23 (1976). In order to gain the right to acquire the land from the Government, the claimant must be able to demonstrate that he has made such a discovery, and that he has met the other requirements for receiving patent. Thus, the claimant bears the ultimate burden of proving his entitlement under these laws. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 419 U.S. 234 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). If no contest proceeding is initiated against the claim, the claimant could prove his entitlement to patent, if he wanted to do so, by presenting an application for patent in which he conclusively shows the validity of the claim.

The Government may, on its own volition, institute a mining claim contest to have a mining claim declared invalid. United States v. Coleman, 395 U.S. 559 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920). Where it does so it bears the burden of establishing a prima facie case that the claim is invalid. Foster v. Seaton, supra at 838; United States v. Springer, supra at 242; United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976). While it normally charges that such a claim is invalid owing to a lack of discovery, it may add other charges of invalidity such as abandonment or improper location. If the Government proves prima facie its charge(s) that the claim is invalid, the claimant must present sufficient evidence to refute the charge(s) by a preponderance of the evidence in order to prevent the voiding of his claim. Id. If the claimant succeeds in doing so, the contest will be dismissed without prejudice. See United States v. Arizona Mining and Refining Co., Inc., 27 IBLA 99, 119 (1976).

If the Government fails to establish a prima facie case of no discovery, or some other ground for invalidity, the claimant need not present any evidence, but may simply move to have the contest complaint dismissed following the completion of the Government's presentation. United States v. Chappell, 42 IBLA 74 (1979); United States v. Cichetti, 36 IBLA 124, 128 (1978); United States v. Slater, 34 IBLA 31, 36 (1978); United States v. Rodgers, 32 IBLA 77, 84 (1977); United States v. Taylor, 19 IBLA 9, 23-24; 82 I.D. 68, 73 (1975). However, if the claimant does not move for dismissal and proceeds to attempt to show that there was discovery (or that the claim was not abandoned nor improperly located, etc.), and actually presents evidence which shows prima facie that there in fact was no discovery, this evidence is properly used against him, regardless of the Government's failure to establish a prima facie case to this effect. Id.

In the instant case, Judge Luoma held that the Government did establish a prima facie case that the Montezuma Nos. 1-7, 9, and 10, and the N.J.J. Nos. 1-4, and 6-11 claims were invalid because there had been no discovery on these claims. He also held that Hess had

failed to present any probative evidence that there had been discovery and so failed to refute the charge of invalidity. Accordingly, he declared these claims void. (While the propriety of this action is not before us, we mention what transpired by way of illustration.) Contrastingly, as to the remaining claims (which are at issue here), Judge Luoma held that the Government had failed to establish its prima facie case, that Hess had effectively, though not actually, made a motion to dismiss the complaint on account of this failure and had not presented any evidence (nor made any admissions) bearing on the validity of these claims. Thus, he concluded, there was a complete absence of evidence in the record showing that these claims were invalid, from which decision the present appeal followed.

[1] The basic rule, which has been followed numerous times, is that a prima facie case has been made when a Government mineral examiner testifies that he has examined the claim and found evidence of mineralization insufficient to support a finding of discovery. United States v. Knecht, 39 IBLA 8, 11 (1979); United States v. Fisher, 37 IBLA 80 (1978); United States v. Marion, 37 IBLA 68 (1978); United States v. Winters, 2 IBLA 329, 335-36, 78 I.D. 193, 195 (1971); and cases cited.

Those cases in which the Department has ruled that a prima facie case of invalidity exists in the absence of a physical inspection of the claim by the mineral examiner have generally involved situations where the existence of the mineral is admitted, but its marketability is dubious. 1/

Thus, in United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973), a mineral contest involving 2,910 association placer claims, this Board found that a prima facie case had been established regarding all of the claims, even though it was undisputed that the mineral examiners had not physically examined each claim. In that

1/ Exceptions to this rule have occurred in the situation where mining claims are inaccessible. See, e.g., United States v. Rukke, 32 IBLA 155 (1977); United States v. Long Beach Salt Co., 23 IBLA 41 (1975). In Rukke, not only were the claims inaccessible, the mineral examiner, who had viewed the claims from a helicopter, testified that the claimant had informed him that he did not "have anything to show" on the inaccessible claims. 32 IBLA at 163. In Long Beach Salt Co., 5 of 36 claims were inaccessible because of the presence of water or layers of slimy mud. The mineral examiners were able, however, to visually examine the claims.

Just as a mineral examiner is not required to enter an unsafe adit, so too, an examiner is not obligated to examine claims which are inaccessible. It is the claimant's responsibility to provide safe access to the mining claims. The claims involved in this appeal, however, were not inaccessible.

case, however, we noted that the contestee had been called as an adverse witness in the Government's case-in-chief, and this testimony buttressed the Government's position. Moreover, the existence of alumina-bearing compounds within the limits of the claims was not in issue; rather, the question was whether there existed any technology which would permit their extraction at a profit.

Similarly, in United States v. Fisher Contracting Co., A-28779 (August 21, 1962), the Department sustained the existence of a prima facie case even though the mineral examiners had testified that they had not physically examined two of the ten claims involved in the contest. The existence of sand and gravel on those two claims was not disputed. The question was whether a market for the sand and gravel existed. Thus, the decision noted that the mineral examiners testified to the general geology of the land which they had observed from an adjacent road, noted the existence of sand and gravel on the claims, but determined that no market therefor existed.

In United States v. Arizona Mining and Refining Co., Inc., supra, the Board ruled, as to certain claims involved therein, that a prima facie case was not presented by the Government because the mineral examiner's evidence did not directly relate to those claims. In both United States v. Flurry, A-30887 (Mar. 5, 1968) and United States v. Coston, A-30835 (Feb. 23, 1968), the question was whether a Government mineral examiner was required to sample every claim he had examined, where he could find no evidence of mineralization. In both of those cases, unlike the one herein, the mineral examiner had physically examined the disputed claims.

We have been unable, however, to discover any case in which the Department has ruled that a prima facie case was established by the testimony of a mineral examiner who had failed to actually traverse the claim, where the issue involved was the existence of mineralization within the claim's limits. The general rule, and one which is of salutary effect, is that set forth in United States v. Winters, supra at 335-36, 78 I.D. at 195:

> Where a Government mineral examiner offers his expert opinion that a discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a prima facie case of invalidity has been made, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witness. But an expert's opinion which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, if evidence is presented that those conditions do exist, is sufficient to establish a prima facie case and to shift the burden of evidence to the contestee. The admissibility

> of expert testimony in a mining claim contest is determined by the hearing examiner, who exercises a wide latitude of discretion in making these determinations. [Emphasis supplied.]

We affirm Judge Luoma's holding that O'Brien's testimony had no probative value concerning the claims which he admittedly never visited or was unsure about having visited. A mineral examiner is obligated to make a careful and competent inspection of a mining claim in order to be able to testify meaningfully on the presence or absence of mineral discovery there. Testimony made in admitted ignorance of the physical status of the land, or based on uncertain recollection about the nature of the land, is entitled to no weight.

O'Brien's failure to conduct a proper examination of the claims is not excused by the fact that Hess may have failed to direct him to take samples on these claims. O'Brien testified that he told Hess that he would be returning in the future to visit these claims (Tr. 34), so Hess had no reason to believe that it was incumbent on him to direct O'Brien to discovery points at that time, and could well have reasonably believed that he should wait until O'Brien returned to do so. Thus, Hess' failure to direct O'Brien to alleged discovery points is without significance.

[2] We reject O'Brien's assertion (Tr. 34) that the fact that these claims are located in the same kind of area with the same topography as the other claims where there was no discovery supports the conclusion that there was also no discovery on these former claims. Geologic inference alone cannot support a determination that a discovery has been made. United States v. Walls, 30 IBLA 333, 338 (1977). Likewise, alleged geological similarities of other claims are insufficient by themselves to show that no discovery has been made on the claims at issue.

[3] Finally, we turn to the question whether the absence of development, over a considerable period of time, may serve to establish a prima facie case of invalidity. We are fully cognizant of the thesis that production is not a precondition of establishing a discovery of a valuable mineral deposit. But it is too late to gainsay the proposition that the failure to produce gives rise to a presumption of invalidity. See United States v. Zweifel, 508 F.2d at 1156, n.5 (10th Cir. 1975). The question which is presented is whether this presumption rises to the level of a prima facie case. We believe that this question must be answered in the affirmative.

Generally speaking, a presumption is an inference of the existence or nonexistence of some fact which courts are required or permitted to draw from proof of other facts. Presumptions:

> [P]lace upon the adverse party the burden of offering further evidence in the sense that a verdict will be directed

> against him if he does not, but they do not affect the ultimate burden of proof, as to the preponderance of the evidence required.

Sowizral v. Hughes, 333 F.2d 829, 833 (3d Cir. 1964) quoting Prosser on Torts, § 41, at 197 (2nd ed. 1955).

Thus, "creation of a presumption is inevitably designed to affect the burden of proof by shifting it from the party possessed of the procedural device to his adversary." Brown v. Oklahoma Transport Co., 588 P.2d 595, 601 (Okl. App. 1978). The effect of this shift is that "if proof of the basic facts are introduced into evidence, the presumed fact is also taken to be proved in the absence of evidence to the contrary." State v. Jones, 88 N.M. 107, 537 P.2d 1006, 1009 (N.M. App. 1975). Accord, Connizzo v. General American Life Ins. Co., 520 S.W.2d 661, 665 (Mo. App. 1975).

That the failure to develop claims over a period of years gives rise to a presumption is clear. Thus, in United States v. Zweifel, supra, the court stated:

> If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction. E.g., United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972); United States v. Ruddock, 52 L.D. 313 (1927); Castle v. Womble, 19 L.D. 455 (1894).

508 F.2d at 1156, n.5.

In United States v. Verrue, 457 F.2d 1202 (9th Cir. 1972), the Court of Appeals held that "the lack of evidence as to sales and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion of the Secretary, when, as here, there is positive evidence in the record of marketability" (emphasis supplied). Id. at 1204. The clear conclusion from the court's statement is that in the absence of positive evidence of marketability the Secretary could properly find a claim invalid.

Thus, while failure to develop a mining claim does not conclusively establish the invalidity of the claim, such failure may nevertheless, when unrebutted by evidence of marketability, give rise to a presumption upon which the claim may be declared invalid. Proof of nondevelopment over a period of time may serve as an independent basis for determining a claim's invalidity where it stands uncontradicted by any relevant evidence. Thus, proof of the fact of nondevelopment may also serve to establish the Government's prima facie case.

We agree that such a prima facie case is the weakest that the Government can establish. The assertion by a mining claimant of a reasonable justification for nondevelopment would defeat the presumption that arises therefrom, and thus effectively rebut the Government's case, resting solely on such a presumption, and require the dismissal of the contest. Such, however, has not occurred herein.

The mineral claimant testified that there had been no production from the claims and that the only development work had been the drilling of various core holes in fulfilling assessment work requirements (Tr. 48). Concerning the mineralization which the claimant alleged existed on the claim, the claimant stated that there was only surface showings of a trace of copper though he believed that there might be ore at depth (Tr. 42). He also admitted that his private assays, which presumably would have encompassed all of the claims, obtained results similar to those shown in the Government's assays (Tr. 48). Reading the claimant's testimony in the most favorable light shows that not only did he fail to rebut the presumption which arose, he actually added weight to the Government's case. We hold, therefore, that these claims should have been declared invalid.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the Montezuma Nos. 8 and 10 and the N.J.J. Nos. 1, 4, 5, and 8 lode mining claims are declared null and void for lack of discovery of a valuable mineral deposit.

James L. Burski
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

There is no requirement that a claimant must produce and sell mineral from his mining claim in order for the claim to be valid. This is acknowledged by the majority. The only evidence relied upon by the majority in holding that these claims are invalid is that the claimant has not yet produced and sold minerals from the claims.

Can a prima facie case of invalidity be established by showing only that the claimant has not done something which is not essential to the validity of the claims? I think not.

There is no doubt that the failure to produce and sell minerals from the claims can raise a presumption, and it is fairly well settled that a prima facie case can be predicated on presumptive evidence. But here the question, as properly posed by the majority, is whether evidence only of the fact of nonproduction creates a presumption which rises to the level of a prima facie case of invalidity. Inasmuch as production is not proof either of the validity or the invalidity of a claim, evidence of nonproduction, standing alone, is an insufficient premise on which to rest a judgment of invalidity. It is not "evidence which, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed." See Dudley's Adm'r. v. Fidelity & Deposit Co., 240 S.W.2d 76, 79 (Ct. App. Ken 1951). Nor is it such evidence "as is sufficient to establish the fact and, if not rebutted or refuted, remain sufficient for the purpose," as was the test in Karabagui v. The Shickshinny, 123 F. Supp. 99 (D. N.Y. 1954), aff'd, 227 F.2d 348 (2nd Cir. 1955).

The fact of nonproduction, while it may constitute evidence and be admissible as such, does not, in and of itself, go to the essential issue, i.e., the validity of the claim. All that single showing establishes is that the claimant has not done something that he was not obliged to do. Only when evidence of nonproduction is coupled with evidence of the reason for such nonproduction can a prima facie case be made. Thus, in all of the prior cases in the long history of mining claim validity determinations where the fact of nonproduction has been held to raise a presumption of invalidity, that fact has always been only one element of the evidentiary mosaic, which when fitted together, was sufficient to raise a prima facie presumption. These previous decisions while recognizing that evidence of nonproduction is relevant to the question of marketability, have always considered it in conjunction with competent expert testimony concerning the nature of the mineralization of the claim and/or testimony relating to economic factors such as extraction, hauling, beneficiation, and sales costs, market demand, supply, prices, etc. Melluzzo v. Morton, 534 F.2d 860, 863 (9th Cir. 1976); Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972); United States v. Wichner, 35 IBLA 240, 243 (1978); United States v. Gibbs, 13 IBLA 382 (1973). No such evidence was presented here. Without evidence to show why the fact of nonproduction is significant, the fact has no significance.

The majority relies on its collective imagination to rationalize a reason which will lend significance to the naked fact of nonproduction. The reason so induced by the majority seems to be that if a claimant fails to exploit a mining claim over a relatively long term, it is a prima facie proof that he could not have done so profitably, because it is contrary to reason and human nature that the owner of a valuable mineral deposit would long delay his opportunity for profit.

But there are many reasons which the imagination can supply which would justify such nonexploitation of a valuable mineral deposit. It is entirely possible that production has been delayed in anticipation of higher market prices in the future, or that the claim(s) is held as a reasonable reserve supply, or because the claimant lacks the financial resources to proceed, or because he has been otherwise occupied. It may even be that the claimant lacks initiative, being bone lazy and indifferent to potential wealth. None of these have anything at all to do with whether a valuable deposit of mineral has been discovered on the claim.

Thus, the mere fact of nonproduction is not prima facie proof of nondiscovery of a valuable mineral deposit, as that fact has only a tangential relationship to the proposition asserted.

Nor did Hess' testimony in any way serve to prove that these claims were invalid. While it fell far short of what would have been required to demonstrate discovery, had the Government met its burden of establishing a prima facie case, Hess did not admit that no discovery had been made on these claims. Thus, there is an absence of proof establishing invalidity, and Judge Luoma properly concluded that the Government's contest complaint alleging invalidity should be dismissed. I would affirm.

Edward W. Stuebing
Administrative Judge